

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Mailed: June 6, 2005
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Aristocrat Technologies, Inc.

Serial No. 76468706

Bernhard Kreten of Bernhard Kreten, Esq. & Associates for
Aristocrat Technologies, Inc.

Barbara Loughran, Trademark Examining Attorney, Law Office
113 (Odette Bonnet, Managing Attorney).

Before Quinn, Hairston and Bucher, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Aristocrat
Technologies, Inc. to register the mark PENNY JACKPOTS for
"gaming devices, namely, gaming machines and associated
software for use therewith, to enable the gaming machine to
run."¹

¹ Application Serial No. 76468706, filed November 7, 2002,
alleging a bona fide intention to use the mark in commerce.

The trademark examining attorney has refused registration under Section 2(e)(1) of the Trademark Act on the ground that, when used in connection with applicant's goods, the mark PENNY JACKPOTS would be merely descriptive of them. In the alternative, the examining attorney has refused registration under Section 2(e)(1) on the ground that, when used in connection with applicant's goods, the mark would be deceptively misdescriptive of them.

When the refusal was made final, applicant appealed. Briefs have been filed, but an oral hearing was not requested.

The examining attorney contends that the applied-for mark is merely descriptive because it describes a significant feature or characteristic of applicant's gaming machines. In support of the refusal, the examining attorney submitted ten dictionary definitions, including the following:

penny: In the United States and Canada, the coin that is worth one cent.

The American Heritage Dictionary of the English Language (4th ed. 2000)(electronic version).

jackpot: A combination on a slot machine that wins a top prize or all the coins available for paying out.

Merriam Webster Online Dictionary.

slot machine: 1. A machine whose operation is begun by dropping a coin into a slot. 2. A coin-operated gambling machine that pays off

according to the matching of symbols on wheels spun by a handle – called also *one-armed bandit*. Merriam Webster Online Dictionary.

gaming: The risking of money in games of chance, especially at a casino: gaming machines/tables. Cambridge Advanced Learner's Dictionary. (electronic version)

gaming: Gambling, especially casino gambling. The American Heritage Dictionary of the English Language. (4th ed. 2000) (electronic version).

Further, the examining attorney requested that applicant submit, if available, any advertisements or promotional materials for the goods to be offered under the PENNY JACKPOTS mark. In response, applicant submitted promotional material for an existing "Scatter Magic" gaming machine.

The examining attorney argues that:

On the second page of the sample promotional materials provided by the Applicant, under the heading "DENOMINATIONS", it is stated that denominations of "1, 2, 5, 10 ,25, and 50 cents", and \$1.00 denominations are "available for both 9 and 20 lines." The promotion goes on to state that "In Nevada, 1 and 2 cent games may require special handling until tokenization is approved."

It therefore appears that at least one, and likely many, of the gaming machines marketed by the applicant are 'slot style' gaming machines that are available in PENNY or "\$.01" denominations (i.e., the "PENNY slots") which would thus have JACKPOTS valued in small or PENNY amount denominations. That the initial JACKPOT receipts may be issued in voucher or ticket form does not preclude the ultimate payout in small or PENNY amount denominations. Either way, the net result is the same: the gaming machines may be

played using PENNY coins or tokens, and the amount of the JACKPOT payouts would be based on a set percentage of the PENNY denominations that go into the machines.
(Brief, pp. 5-6).

Based on the foregoing evidence, the examining attorney contends that PENNY JACKPOTS immediately describes a feature or characteristic of applicant's goods, namely, gaming machines that may be played using penny coins or tokens and with jackpots based on a percentage of the penny amounts paid into the machines.

However, in the event that applicant's gaming machines may not be played using such coins or tokens and do not offer jackpots based thereon, the examining attorney argues that the mark PENNY JACKPOTS would be deceptively misdescriptive of the goods. In this regard, the examining attorney points out that the promotional material shows that applicant's marks are "embossed directly on the goods, the marks travel with the goods to the casino floor, where the machines are made available for play by the casino customers and where such end-users of the gaming machines also would encounter the marks affixed to the goods by Applicant." (Brief, p. 7). Thus, the examining attorney maintains that a casino customer would expect a gaming machine bearing the mark PENNY JACKPOTS to "be a PENNY play

and PENNY JACKPOT pay machine." (Brief, p. 8). Thus, the examining attorney argues that if such a gaming machine may not be played using penny coins or tokens with resulting jackpots based on a percentage of the penny amounts paid into the machines, the mark PENNY JACKPOTS would be deceptively misdescriptive of such goods.

Applicant, in urging reversal of the refusal to register, argues that PENNY JACKPOTS is only suggestive of gaming devices and that "consumers of applicant's gaming devices, upon hearing or seeing the mark PENNY JACKPOTS would not immediately imagine gaming devices." (Brief, p. 3). Also, applicant argues that the examining attorney has improperly dissected its mark and failed to consider the mark in its entirety. With respect to the alternative refusal on the ground that the mark is deceptively misdescriptive, applicant argues that the purchasers of its goods are owners of gaming establishments who are sophisticated and therefore are not likely to be deceived as to the nature of the goods.

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See *In re Abcor*

Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBA Associates*, 180 USPQ 338 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used or is intended to be used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use or intended use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

A term is deceptively misdescriptive under Section 2(e)(1) if it meets a two fold test. First, the term must be found to misdescribe a characteristic, quality, function or use of the goods or services. If so, it must be determined whether the misdescription is deceptive, i.e., whether prospective purchasers are likely to believe the misdescription actually describes the goods or services.

In re Berman Bros. Harlem Furniture Inc., 26 USPQ 1514
(TTAB 1993).

After careful consideration of the record and the arguments herein, we find that PENNY JACKPOTS immediately conveys information about the nature of applicant's gaming machines, namely, that they may be played using penny coins or tokens with resulting jackpots based on a percentage of the penny amounts paid into the machines. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information for players of applicant's gaming machines to perceive the merely descriptive significance of PENNY JACKPOTS as it pertains to such goods.

Further, in the event that a player cannot use penny coins or tokens in applicant's gaming machines and the resulting jackpots are not based on a percentage of the penny amounts paid into the machines, we find that the mark PENNY JACKPOTS is deceptively misdescriptive of such goods. As the examining attorney correctly notes, the Board must consider how casino patrons, not simply purchasers of gaming machines, would view PENNY JACKPOTS when used on gaming machines.

Decision: The refusal to register under Section 2(e)(1) is affirmed.